

**IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,	)	
	)	
v.	)	C.A. No. 0903020900
	)	
JIMMY C. HOPPER,	)	
	)	
Defendant.	)	

Submitted: August 25, 2010  
Decided: October 1, 2010

**DECISION AFTER TRIAL**

Sonia Augusthy, Esquire, Deputy Attorney General, State of Delaware Department of Justice, Carvel State Office Building, 820 N. French Street, Wilmington, Delaware 19801. Attorney for the State of Delaware.

Louis B. Ferrara, Esquire, Ferrara & Haley, 1716 Wawaset Street, P.O. Box 188, Wilmington, Delaware, 19899-0188. Attorney for Defendant.

**DAVIS, J.**

Defendant Jimmy C. Hopper was arrested on March 26, 2009 and charged with the offense of driving under the influence of alcohol (the “DUI Offense”) in violation of Title 21, Section 4177 (a) (1) of the Delaware Code of 1974, as amended. A bench trial on the DUI Offense was held on August 25, 2010. At the conclusion of the trial, the Court made a preliminary ruling that Mr. Hopper was guilty of the DUI Offense but otherwise reserved making a final ruling in order to issue this written decision. This is the Court’s decision after trial. After a review of the record, and based upon the legal and factual determinations made during the trial, the Court concludes that Mr. Hopper is GUILTY of the DUI Offense.

## **I. BACKGROUND**

### **A. General Information**

On August 25, 2010, the Court held a trial on the charged DUI Offense against Mr. Hopper. At trial, the State called two witnesses – Corporal Roger Cresto and Corporal Scott Shelton. Both Corporal Cresto and Corporal Shelton are members of the Delaware State Police. Corporal Cresto made the initial stop and arrest of Mr. Hopper. Corporal Shelton subsequently investigated and charged Mr. Hopper with the DUI Offense. In addition to the two witnesses, the State introduced into evidence eight (8) exhibits. These exhibits are:

- State's Exhibit 1: NHTSA-DUI Detection and Horizontal Gaze NYSTAGMUS Certification of Scott Sheldon dated August 28, 2002 ("Ex. 1");
- State's Exhibit 2: Intoxilyzer 5000 Certification of Scott Sheldon dated August 30, 2002 ("Ex. 2");
- State's Exhibit 3: Delaware State Police Certificate of Proficiency certifying that Scott Sheldon is licensed to perform the duties of an alcohol testing technician ("Ex. 3");
- State's Exhibit 4: CMI Intoxilyzer Model 5000EN Certification Sheet dated January 20, 2009 ("Ex. 4");
- State's Exhibit 5: CMI Intoxilyzer Model 5000EN Certification Sheet dated March 9, 2009 ("Ex. 5");
- State's Exhibit 6: CMI Intoxilyzer Model 5000EN Certification Sheet dated April 30, 2009 ("Ex. 6");
- State's Exhibit 7: Jimmy Hopper DVD-R from Intoxilyzer Room at Troop 6 ("Ex. 7"); and
- State's Exhibit 8: Intoxilyzer Instrument Printer Card of Jimmy C. Hopper dated March 26, 2009 ("Ex. 8").

Mr. Hopper did not present any additional testimonial or physical evidence at trial.

## **B. Facts Developed at Trial**

The State first called Corporal Cresto to testify at trial. Corporal Cresto has been on the Delaware State Police Department for 5.5 years and is a member of homicide unit. On March 26, 2009, at approximately 2:30 a.m., Corporal Cresto was at Tailgates Restaurant and Bar in Harmony Plaza Shopping Center to investigate an unrelated complaint. According to Corporal Cresto, he and other State Police officers left Tailgates and stood outside while discussing matters concerning to the complaint. During their discussion, Corporal Cresto observed a dark color, four door sedan (the “Vehicle”) drive past the officers in the shopping center parking lot.

As the vehicle drove by the officers, Corporal Cresto observed that the windows were overly tinted and partially rolled down. The vehicle was emitting smoke through its open windows as it proceeded through the parking lot. Corporal Cresto recognized the smell of the smoke as that of burning marijuana. The vehicle was moving toward the exit of the Shopping Center at a slow speed. Due to these observations, Corporal Cresto followed the vehicle in his police cruiser as it exited the Shopping Center and traveled west on Route 4. The vehicle continued for a short distance and then made a proper u-turn to head east on Route 4. Corporal Cresto noted that he did not observe any erratic driving of the vehicle, no excessive speed and that the vehicle otherwise obeyed all other traffic laws. Corporal Cresto activated his police cruiser’s emergency lights and pulled the vehicle over on the shoulder of the roadway.

Corporal Cresto called in the stop on his radio and approached the passenger side of the vehicle. As he approached, Corporal Cresto observed a “bong” on the passenger seat side of the vehicle. Corporal Cresto testified that, as a result of his training and experience, he recognized the bong as the type that is commonly used to smoke marijuana. Corporal Cresto identified Mr. Hopper as the driver of the vehicle. Because the drug paraphernalia was in plain view, Corporal

Cresto removed Mr. Hopper from his vehicle, arrested, handcuffed and placed Mr. Hopper in the rear seat of a police vehicle.

Corporal Cresto's shift was almost over so he waited for other officers to arrive so that they could continue the investigation. Delaware State Police Corporal Scott Shelton arrived shortly thereafter. At the scene, Corporal Cresto advised Corporal Shelton that he stopped the vehicle because of a possible tint violation and the smell of burnt marijuana coming from the vehicle. Additionally, Corporal Shelton was informed that drug paraphernalia had been seized.

The State next called Corporal Shelton to testify. Corporal Shelton is from Troop Six of the Delaware State Police and is a member of the uniform patrol division. He has been with the Delaware State Police since October 2008. Corporal Shelton was previously employed by the Elsmere Police Department. Corporal Shelton has training and experience with respect to DUIs. Corporal Shelton successfully completed police training in "NHTSA-DUI detection and Horizontal Gaze NYSTAGMUS Certification" on August 28, 2002. Ex. 1. Corporal Shelton also completed police training on the Intoxilyzer 5000 on August 30, 2002. Ex. 2. In addition, the State demonstrated that Corporal Shelton is licensed by the Delaware Department of Public Safety and the Division of State Police to perform the duties of an alcohol testing technician. Ex. 3. Corporal Shelton testified that he has conducted between 80-120 DUI arrests during his career as a law enforcement officer.

Corporal Shelton then testified that he made contact with Mr. Hopper in the back seat of Corporal Cresto's police cruiser. Upon opening the door to the police cruiser, where Mr. Hopper was seated, Corporal Shelton smelled an odor of marijuana and alcohol. Corporal Shelton removed Mr. Hopper from the police cruiser and took the handcuffs off his wrists. According to

Corporal Shelton, Mr. Hopper's eyes appeared to be "watery, glazed and glassy." Corporal Shelton also noted that Mr. Hopper was cooperative and that his speech seemed normal.

Based on initial observations, Corporal Shelton began to conduct an investigation to determine whether Mr. Hopper was driving under the influence of alcohol. Corporal Shelton administered two National Highway Transportation Safety Administration ("NHTSA") approved field sobriety tests: the Horizontal Gaze Nystagmus ("HGN") and the Walk-and-Turn. During the HGN test, Corporal Shelton reported that Mr. Hopper exhibited six out of six clues. The Walk-and-Turn test was conducted on the sidewalk adjacent to the roadway. According to Corporal Shelton, Mr. Hopper exhibited five out of eight clues on the Walk-and-Turn test. On the Walk-and-Turn test, Corporal Shelton observed defendant begin before the instructions were finished, miss heel-to-toe, step offline, raise his arms for balance and lose his balance on the pivot turn.

After completion of these two tests, Corporal Shelton explained the One-Leg Stand test to Mr. Hopper. At that time, Mr. Hopper advised that he could not complete the One-Leg Stand test due to physical limitations as a result of prior operations on both knees. Corporal Shelton administered a Portable Breath Test and then transported Mr. Hopper to Delaware State Police Troop Six to administer an intoxilyzer test and continue the DUI investigation.

The State introduced into evidence and played a video of the twenty minute observation period in a room at Troop Six. The video showed Mr. Hopper seated next to the Intoxilyzer machine and talking with Corporal Shelton. Ex. 7. On the video, Mr. Hopper rambles on various issues during the observation period and his speech is noticeably mumbled and slurred. Corporal Shelton waited over twenty-five minutes from the time he started the observation period until the test was actually administered. Mr. Hopper performed the test and the

intoxilyzer instrument printer card recorded Mr. Hopper's blood alcohol concentration at .164%.  
Ex. 8.

Corporal Shelton made the decision to charge Mr. Hopper with the DUI Offense. However, Corporal Shelton chose not to proceed with a charge against Mr. Hopper for possession of drug paraphernalia.

## **II. ANALYSIS**

"No person shall drive a vehicle ... [w]hen the person is under the influence of alcohol."<sup>1</sup> The State must prove each element of the charge beyond a reasonable doubt.<sup>2</sup> For the State to meet its burden it must prove two elements: (1) operation of a vehicle, and (2) prohibited blood alcohol concentration.<sup>3</sup> Once the State has met its burden with respect to these two elements defendant is guilty of DUI.

### **A. Initial Stop and Field Sobriety Tests**

Prior to trial, Mr. Hopper filed a motion to suppress the results of the field sobriety tests and the intoxilyzer test. As explained at trial, the motion to suppress contends that Corporal Cresto lacked reasonable suspicion to stop Mr. Hopper's vehicle. Moreover, the motion to suppress claims that Corporal Cresto and/or Corporal Shelton lacked probable cause to arrest Mr. Hopper and, eventually, administer the intoxilyzer test.

A traffic stop constitutes a seizure for Fourth Amendment purposes and is subject to constitutional limitations.<sup>4</sup> The State bears the burden of showing that the "stop and any subsequent police investigation were reasonable in the circumstances."<sup>5</sup> First, the stop must be supported by reasonable articulable suspicion that a crime has occurred, is occurring, or is about

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<sup>1</sup> 21 *Del. C.* § 4177 (a) (1).

<sup>2</sup> 11 *Del. C.* §301.

<sup>3</sup> *Coxe v. State*, 281 A.2d 606 (Del. 1971).

<sup>4</sup> *Whren v. United States*, 517 U.S. 806, 809 (1996).

<sup>5</sup> *Terry v. Ohio*, 392 U.S. 1, 29 (1968).

to occur.<sup>6</sup> Second, the stop and ensuing inquiry must be reasonably related in scope to the reason for initially stopping the car.<sup>7</sup> “[A]ny investigation of the vehicle or its occupants beyond that required to complete the purpose of the traffic stop constitutes a separate seizure that must be supported by additional facts sufficient to justify the additional intrusion.”<sup>8</sup> A seizure becomes an arrest when, in view of the surrounding circumstances, the officers conduct would communicate “to a reasonable person that he was not at liberty to ignore the police presence and go about his business.”<sup>9</sup>

“When a person operates a motor vehicle in Delaware, he or she is deemed by statute to have given consent to chemical tests, including a test of the breath to determine the presence of alcohol or drugs.”<sup>10</sup> A person may be required to submit to an intoxilyzer test when an officer has probable cause to believe that the person was driving while under the influence of alcohol or drugs. An officer has probable cause when the officer has information which would warrant a reasonable man in believing that a crime has occurred.<sup>11</sup>

The probable cause determination is discussed in more detail in *State v. Maxwell*.<sup>12</sup> In *Maxwell*, the Delaware Supreme Court held that “probable cause is now measured, not by precise standards, but by the totality of the circumstances through a case by case review of ‘the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’”<sup>13</sup> Probable cause exists when, under the totality of the circumstances, there is a fair probability that a defendant has committed a crime.<sup>14</sup>

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<sup>6</sup> *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

<sup>7</sup> *Jenkins v. State*, 970 A.2d 154, 158 (Del. 2009) (citing *Caldwell v. State*, 780 A.2d 1037 (Del. 2001)).

<sup>8</sup> *Id.*

<sup>9</sup> *Jones v. State*, 745 A.2d 856, 862 (Del. 1999).

<sup>10</sup> *Bease v. State*, 884 A.2d 495, 497-498 (Del. 2005) (citing Del. Code Ann. tit. 21, § 2740 (a) (2005)).

<sup>11</sup> *State v. Trager*, 2006 WL 2194764 (Del Super. 2006) (citing *State v. Maxwell*, 624 A.2d 926 (Del. 1993)).

<sup>12</sup> 624 A.2d 926 (Del. 1993).

<sup>13</sup> *Maxwell*, 624 A.2d at 929 (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)).

<sup>14</sup> See *Maxwell* at 930 (citing *Jarvis v. State*, 600 A.2d 38, 42-43 (Del. 1991)).

Mr. Hopper was initially stopped by Corporal Cresto for suspicion of possession of marijuana and illegal window tint.<sup>15</sup> The initial stop was justified because Corporal Cresto had reason to believe Mr. Hopper had committed a motor vehicle violation and a drug offense. Corporal Cresto testified that he personally observed improperly tinted windows on Mr. Hopper's vehicle. Additionally, Corporal Cresto smelled an odor of marijuana emanating from the vehicle. Mr. Hopper was the only occupant at the time of the stop. While approaching Mr. Hopper's vehicle, Corporal Cresto observed a bong located in front seat of the vehicle. After observing drug paraphernalia in plain view, Corporal Cresto placed Mr. Hopper under arrest. Under the totality of the circumstances, Corporal Cresto had probable cause to arrest Mr. Hopper for possession of drug paraphernalia.

Shortly after arriving at the location of the vehicle stop, Corporal Shelton made contact with Mr. Hopper. During the initial contact, Corporal Shelton noticed the smell of marijuana and alcohol coming from Mr. Hopper. Corporal Shelton then began an investigation to determine whether Mr. Hopper was driving under the influence of alcohol.

Corporal Shelton administered two NHTSA approved field sobriety tests: the HGN and the Walk-and-Turn.<sup>16</sup> During the HGN test, Mr. Hopper exhibited six out of six clues.<sup>17</sup> The Walk-and-Turn test was conducted on the sidewalk adjacent to the roadway. Mr. Hopper exhibited five out of eight clues on the Walk-and-Turn test. On the Walk-and-Turn test Corporal

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<sup>15</sup> Window tint in violation of 21 *Del. C.* § 4313 and Possession of Drug Paraphernalia in violation of 16 *Del. C.* § 4771.

<sup>16</sup> Corporal Shelton is certified by the Delaware State Police in NHTSA-DUI Detection and HGN. Ex. 1. In addition to the Delaware State Police training, Corporal Shelton estimated that he has conducted 80-120 DUI arrests in which he always administers the HGN test.

<sup>17</sup> Mr. Hopper argued that the Court should disregard Corporal Shelton's observations during the HGN test because Corporal Shelton did not know the proper procedure to determine two of the six clues indicating intoxication. This argument does not need to be addressed because four out of six clues constitutes a failure on the HGN test and Mr. Hopper did not object to the officers knowledge of the test concerning the other four clues. Therefore, even assuming Corporal Shelton improperly identified two incorrect clues, Mr. Hopper still exhibited four out of six clues on the test.

Shelton observed Mr. Hopper begin before the instructions were finished, miss heel-to-toe, step offline, raise his arms for balance and lose his balance on the pivot turn.

After completion of these two tests, Corporal Shelton explained the One-Leg Stand test to Mr. Hopper. At that time, Mr. Hopper first advised that he could not complete the One-Leg Stand test due to physical limitations as a result of prior operations on both knees.<sup>18</sup> Corporal Shelton administered a Portable Breath Test and then transported defendant to Delaware State Police Troop Six to administer the intoxilyzer test and continue the DUI investigation.<sup>19</sup>

The detention of Mr. Hopper for the purpose of conducting a DUI investigation was supported by reasonable suspicion. While Mr. Hopper was legally detained for the crime of possession of drug paraphernalia, Corporal Shelton detected an odor of alcohol and marijuana and observed “watery, glazed, and glassy” eyes on Mr. Hopper. Due to these observations, Corporal Shelton decided to conduct an investigation for driving under the influence of alcohol. Mr. Hopper agreed to perform two field sobriety tests. Mr. Hopper’s performance on the two field sobriety tests was identified as “poor.” The information known to Corporal Shelton amounted to at least a fair probability Mr. Hopper was driving under the influence of alcohol. Therefore, Corporal Shelton had probable cause to believe that defendant had violated 21 *Del. C.* § 4177.

## **B. Intoxilyzer Calibration Records**

The State may prove the element of intoxication by admitting into evidence the results of a chemical test showing defendants blood alcohol concentration. Under Delaware law, in order

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<sup>18</sup> Corporal Shelton testified that he would not have administered the Walk-and-Turn test if he had been aware of Mr. Hopper’s physical limitations. However, Corporal Shelton testified that prior to administering the Walk-and-Turn test he asked Mr. Hopper whether there were any physical limitations that would preclude him from completing the test. Mr. Hopper replied that there were no physical limitations at that time.

<sup>19</sup> During trial, the State conceded that the result of the Portable Breath Test is not admissible due to the recent Delaware Supreme Court Decision: *Miller v. State of Delaware*, 2010 WL 2253743 (Del. June 7, 2010).

to admit the results of an intoxilyzer test into evidence, the State must lay an adequate evidentiary foundation for the test and the reliability of the intoxilyzer machine used to measure Mr. Hopper's breath.<sup>20</sup> To do this, the State must first introduce the certifications of the State Chemist that the intoxilyzer was operating accurately before and after testing the breath of a defendant.<sup>21</sup>

The State is not required to produce the State Chemist to introduce the intoxilyzer certification sheets and may rely on the business records exception to the hearsay rule, D.R.E. 803(6), by presenting a custodian or other qualified witness. To meet the requirements under D.R.E. 803(6), the party proffering the evidence must show that the business record was: (i) prepared in the regular course of business; (ii) made at or near the time of the event; (iii) trustworthy; and (iv) testified to by the custodian of the record or other qualified person.<sup>22</sup>

When introducing calibration sheets the State often relies on the testimony of the investigating officer as a qualified witness. Before presenting the officer as a qualified witness the state must lay the proper foundation.<sup>23</sup>

A qualified witness, in addition to his or her familiarity with the record-keeping system, must attest to the following foundational requirements of Rule 803(6): '(1) [that] the declarant in the records had knowledge to make accurate statements; (2) that the declarant recorded statements contemporaneously with the actions which were the subject of the reports; (3) that the declarant made the record in the regular course of business activity; and (4) that such records were regularly kept by the business.'<sup>24</sup>

During trial, the State sought to introduce evidence that the intoxilyzer machine at Troop Six was calibrated and working properly as checked by State Chemist Julie Willey before and

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<sup>20</sup> See *Clawson v. State*, 867 A.2d 187 (Del. Supr. 2005).

<sup>21</sup> See *McConnell v. State*, 1994 WL 43751 (Del. Feb. 3, 1994); *Anderson v. State*, 675 A.2d 943 (Del. 1996).

<sup>22</sup> See *Tally v. State*, 841 A.2d 308 (Del. Supr. 2003).

<sup>23</sup> *Trawick v. State*, 845 A.2d 505, 508-509 (Del. 2004).

<sup>24</sup> *Id.* (citing *United States v. Console*, 13 F.3d 641, 657 (3d Cir. 1993)).

after the test was administered to Mr. Hopper. The State offered Corporal Shelton as a qualified witness to introduce the calibration sheets relevant in this matter.

Mr. Hopper objected to the admission into evidence of the intoxilyzer calibration records on the grounds that Corporal Shelton is not an “other qualified witness.” During his intoxilyzer training, Corporal Shelton observed State Chemist David Sockrider perform calibration checks on an intoxilyzer machine; however, State Chemist Julie Willey performed the calibration checks on the intoxilyzer machine used to test Mr. Hopper’s blood alcohol concentration. Mr. Hopper argued that Corporal Shelton did not have knowledge of the procedure used to check calibration by State Chemist Julie Willey and, therefore, Corporal Shelton did not satisfy the necessary foundational requirements to testify as a qualified witness.

The State satisfied the necessary foundational requirements to offer Corporal Shelton as a qualified witness to introduce the intoxilyzer calibration records. On direct examination, Corporal Shelton explained how the test is performed and recorded. Corporal Shelton has training and experience with respect to DUIs. On August 30, 2002, Corporal Shelton completed police training on the Intoxilyzer 5000. Ex. 2. In addition, Corporal Shelton is licensed by the Delaware Department of Public Safety and the Division of State Police to perform the duties of an alcohol testing technician. Ex. 3. Corporal Shelton also testified: (i) how the State Chemist performs the test; (ii) the State Chemist records the results contemporaneously with the test; (iii) the State Chemist prepares that the calibration sheets at issue in the regular course of business; and (iv) the State Police maintain the calibration sheets in the ordinary course of business.

On cross examination, Corporal Shelton testified that he knows State Chemists Julie Willey and David Sockrider follow the same procedure to check calibration of the intoxilyzer machines. Although Corporal Shelton admitted he had not observed Julie Willey testing the

intoxilyzer, Corporal Shelton stated that he rested his belief on that fact that the State Police would have notified him if the State Chemist had changed the procedures for testing the accuracy of the intoxilyzer.

Mr. Hopper's argument against admitting intoxilyzer calibration records here construes D.R.E. 803(6) too narrowly. A qualified witness under the business records exception does not need to have the type of personal knowledge concerning the creation of a business record that Mr. Hopper suggests is necessary. It is sufficient for the qualified witness to testify that he is familiar with the record keeping system and that the record being introduced was created and maintained in accordance with the record keeping system.<sup>25</sup>

At trial, the Court held that Corporal Shelton satisfied the foundational requirements to testify as a qualified witness. Corporal Shelton is familiar with the process used by the State Chemist to test calibration of an intoxilyzer machine and record the results. The calibration sheets presented by the State were recorded consistent with the record keeping system used by the State Police. The State introduced calibration checks from March 9, 2009 and April 30, 2009 certifying that the intoxilyzer machine was "working properly and accurately." Ex. 5; Ex. 6.

### **C. Intoxilyzer Test Result**

In order for the result of the intoxilyzer to be admitted, the State must lay "an adequate evidentiary foundation showing that there was an uninterrupted twenty minute observation of the defendant prior to testing."<sup>26</sup> The State introduced into evidence and played a video of the twenty minute observation period in the intoxilyzer room at Troop Six showing Mr. Hopper seated next to the Intoxilyzer machine, speaking to Corporal Shelton. Mr. Hopper's speech is noticeably mumbled and slurred during the observation period. Corporal Shelton waited over

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<sup>25</sup> See, e.g., *United States v. Console*, 13 F.3d 641, 657 (3d Cir. 1993).

<sup>26</sup> *Clawson v. State*, 867 A.2d 187, 192 (Del. 2005).

twenty-five minutes from the time he started the observation period until the test was administered in accordance with required procedure. The State moved the intoxilyzer card used to test defendant's blood alcohol concentration into evidence. The intoxilyzer card recorded Mr. Hopper's blood alcohol concentration at .164%. Ex. 8.

### **III. CONCLUSION**

For the foregoing reasons, the Court holds that the stop of Mr. Hopper's vehicle was supported by reasonable suspicion that a crime had occurred. While approaching the vehicle drug paraphernalia was observed in plain view in Mr. Hopper's possession. Mr. Hopper was lawfully arrested for possession of drug paraphernalia. During Mr. Hopper's lawful arrest, Corporal Shelton developed reasonable suspicion that Mr. Hopper was driving under the influence of alcohol. Corporal Shelton had Mr. Hopper perform two field sobriety tests, which Mr. Hopper failed. Because of Mr. Hopper's performance on the field sobriety tests, the odor of alcohol, and "watery, glazed and glassy" eyes, Corporal Shelton had probable cause to transport Mr. Hopper to Troop Six and administer the intoxilyzer test. The intoxilyzer recorded Mr. Hopper's blood alcohol concentration at .164%. Therefore, the State has met its burden to prove beyond a reasonable doubt that defendant operated a vehicle with a prohibited alcohol concentration and defendant is GUILTY of the DUI Offense.

The Clerk of the Court shall schedule this matter for sentencing.

**IT IS SO ORDERED.**

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Eric M. Davis  
Judge

